

Clouds on the Horizon of Humanitarian Law?

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Humanitarian law rests on fragile foundations. It is true that its purpose, to protect basic human values in times of immediate threat to physical integrity and to life, will in principle find support in every culture. But it depends on so many circumstances and assumptions that its acceptance appears to be an expression of civilization that today can no longer be taken for granted. Humanitarian law calls for the rule of law in the context of violence, hate, and anarchy. Its rules are applicable without regard to reciprocity, even though the expectation of reciprocity is in practice one of the main motivations for accepting rules. The driving force behind military operations is end-oriented efficiency, not the pursuit of humanitarian considerations. The deeper and more fundamental a dispute between enemies grows, the less the inhibitions to disregard humanitarian law; religious beliefs and assertions of the principle of military necessity may attest to this dilemma.

Of course, the immediate threats of military defeat and of personal capture have always threatened the rule of humanitarian law. Commentators may not always accept or express the resulting fragility of humanitarian rules, but in reality there is little doubt that no other segment of international rules depends for its acceptance so much on the circumstances and the climate of the moment.

In the context of the evolving international political climate, the most pressing questions for the future of humanitarian law will not concern questions of detail, but their suitability and acceptance in the fight against terrorism and the dangers of weapons of mass destruction. Will those powers, public or private, from whom such threats may arise, be inclined to accept, in principle, the rules of humanitarian law? Will those states fighting these powers be prepared to observe humanitarian law under such circumstances? And will the asymmetry between high technology and primitive weaponry reduce the willingness to comply with humanitarian law?

An equally, if not more, important question is whether the erosion of the rules on the legality of war as they were laid down in the Charter of the United Nations and largely accepted since 1945 will spill over into the realm of humanitarian law. And, even more broadly speaking, would an eventual international climate eroding the foundations of the rule of law in international relations remain isolated from the humanitarian rules, with their inherent fragility?

As to the type and nature of wars in the future, it does not appear unrealistic today to assume that terrorist movements, countries in possession

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of weapons of mass destruction, and countries suspected of gaining access to such weapons will come to the forefront of theaters of war. Predicting the values, priorities, and goals of such actors is highly speculative. But it is by no means unlikely that the balance of values which has led civilized nations in the past century to accept rules of humanitarian warfare may be overshadowed in the strategic thinking of such powers by the absoluteness of the objectives and goals which they pursue. Suicide bombers and their ilk are not likely to worry over the Geneva conventions and their interpretation, and states which have built up systems for weapons of mass destruction, possibly undercover in order to protect their interests, may also not share the priorities which underlie the Geneva Conventions.

In view of such enemies, or potential enemies, it is unrealistic to expect that states, targeted by radical fundamentalists, will draw the lines in their defensive actions, and their strategies in general, precisely in accordance with the humanitarian values which have informed the Geneva Conventions. In the absence of an expectation of reciprocity during armed conflict and the ideal of a harmonious coexistence of the enemies after the end of a war, public support for a graceful conduct of warfare may vanish quickly. The differing attitudes of the United States and large segments of European public opinion toward the prisoners in Guantanamo after the Afghan war presumably reflected the different sense of threat: had the Eiffel tower or the Frankfurt financial highrises been hit instead of the World Trade Center, the sentiment toward the enemy prisoners might well have been different in France or Germany, and less room would have been left for the spokespersons in support of a broad interpretation of the Geneva rules.

The radical differences in technology available to wage war may also militate against humanitarian considerations of warfare. While it appears doubtful that high technology weaponry, dominated by a new generation of weaponry produced in the United States, indeed led to more civilian victims in the Kosovo war and in the 2003 Iraq war, situations and considerations may vary in the future. And on the part of terrorists and states inclined to use weapons of mass destruction, the difference in weaponry may prompt considerations of the need to use all available means, regardless of their precise effects, so as to counter the superior weapons of the enemy.

A second front on the horizon of humanitarian law concerns the linkage in practice between humanitarian law and the laws on the legality of war. If it indeed turns out that the regime of Chapter VII as negotiated in 1945 becomes obsolete in light of new challenges not foreseen in 1945, and not manageable on the basis of these rules in the opinion of the international community or of major actors, the impact of such a new situation on humanitarian law would by no means be clear-cut. Of course, many will argue that humanity in warfare becomes even more important in case the prohibition on the use of force becomes porous, and more wars result. Indeed, this would be the consequence derived from the application of humanitarian law and its purpose to protect human values, rather than efficiency in warfare. However, a realistic perspective will not overlook that this is only one possible conclusion and that other scenarios are also conceivable in practice. Indeed, it may be argued that

progress achieved since 1945 in the *jus ad bellum* and the *jus in bello* has been founded on experiences, values, and priorities reflected in both legal areas; that the two bodies of law are tied together in their foundations; and that an erosion in the right to initiate war will have repercussions and prompt parallel regressions in the rules regulating warfare. A state that has acted inconsistently with accepted rules in initiating war will not always find it easy to invoke the rules governing humane treatment of prisoners with success, again because of the possibility of mutual escalation of rhetoric and disrespect for the rights of the other side.

On a third front, a scenario of a general decline in the rule of law in international relations will need to be taken into account. The past few years have seen major developments that would favor cooperation based on legal rules, but instances that pose questions in this context have been equally prominent. And, of course, the rules governing the right to initiate a war are at the heart of the current legal framework. Whenever the rule of law begins to fluctuate, a spillover into the rules of warfare may follow; as one of the most vulnerable areas, and in this sense the weakest segment of international law, humanitarian law might well suffer from any loosening of the general fabric of international law.

Against this background, it appears that there are clouds and fog on the horizon of humanitarian law, not because of uncertainties about any particular facet of this law, but because of the broader context and climate surrounding humanitarian law.

The military efforts in Afghanistan and Iraq were meant to counteract intolerable forces of terror and instability. The vision of a new and better world order, however, cannot be built on a military response alone. International law, weak as it has always been, has evolved as a key instrument for preserving and creating order. Alternatives such as strict unilateralism, even when founded in principle, do not promise more order. If the considerations set forth above are correct, the gravest threats to humanitarian law will arise from instabilities in the laws governing the use of force and an erosion of the basic notion of the rule of law as a guiding force in international relations.

The current forces threatening the rule of law are essentially tied to terrorism and the proliferation of weapons of mass destruction. These issues have occupied the international agenda in the past. But too often they have been relegated to the rank of secondary issues by matters of daily and immediate concern considered as requiring a direct response regardless of long-term effects. The purposes of humanitarian law would be best served if the order of priority is reversed and the long-term fight against terrorism and the proliferation of weapons of mass destruction is moved to the center stage of international relations. This reordering of priorities must be accomplished without regard to daily, weekly, or monthly concerns diverting political attention in other directions. The evolution of humanitarian law will depend on its broader context. Its object and purposes will be best served if the international agenda is freed from the forces of terrorism and weapons of mass destruction.

What is required is more reflection and action on long-term strategies to counter these systematic threats, taking into account their origins, their driving forces, and the conditions for their spreading. In other words, the strength of the military response must be matched by a diplomatic effort with the same determination, guided by a reflection of the conditions for long-term international stability and a positive role of international law for achieving these goals. Humanitarian law will grow and survive only within the framework of a broader context that accepts and fosters both humanitarian goals and the rule of law. The war in Iraq was unique in its underlying abstract goal—to deter terrorism, to free the world from dangerous despots, and to signal that the free world is willing to defend its values against such dark forces. After the war, the same focus on success, and the same willingness to pursue the same goals, will both be required on the diplomatic level to truly move the international system toward stability, freedom, and the rule of law.